No. 88-522

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1988

NEW YORK HOTEL TRADES COUNCIL AND HOTEL ASSOCIATION OF NEW YORK CITY, INC. PENSION FUND and VITO J. PITTA AND ALBERT A. FORMICOLA, as Trustees of New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund,
Petitioners,

v.

PARK SOUTH HOTEL CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

If a change in the identity of a partnership's partners does not cause the partnership to cease paying contributions to a multiemployer pension plan or to cease having an obligation to pay such contributions or to cease operations covered by such plan, may the plan nevertheless assert that the partnership has withdrawn from the plan and collect withdrawal liability from the partnership's former general partner?

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STATEMENT OF THE CASE

The Petition for a Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Second Circuit in *Park South Hotel Corp.* v. *New York Hotel Trades Council,* 851 F.2d 578 (2d Cir. 1988). This brief is submitted in opposition to that Petition.

Respondent Park South Hotel Corp.[1] ("Hotel Corp.") was, until August 11, 1981, the general partner of Park South Associates, a limited partnership which owned the Barbizon Plaza Hotel in New York City. On August 11, 1981, Hotel Corp. and the limited partners of Park South Associates sold their interests in the partnership. The buying and selling partners all executed an Amended and Restated Certificate of Limited Partnership admitting the new partners as general and limited partners of Park South Associates. 851 F.2d at 580.

Both before and after the 1981 transfer of interests in the partnership, Park South Associates paid contributions to the petitioner New York Hotel Trades Council and Hotel Association of New York City, Inc. Pension Fund (the "Fund"), a multiemployer pension plan, on behalf of its employees pursuant to a collective bargaining agreement. Park South Associates continued to own the hotel and continued its membership in the employer association whose collective bargaining agreement with a union required contributions to the Fund. *Id.* at 580-81.

Despite this continuity of the contribution relationship between the Fund and Park South Associates, the Fund demanded that Hotel Corp., as the partnership's former general partner, pay withdrawal liability to the Fund pursuant to Part 1 of Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), P.L. 93-406, as amended by Title I of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 29 U.S.C. §§ 1381-1405 (1982). The Fund claimed that the sale of the partnership interests in Park South Associates

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[1] Park South Hotel Corp. has no affiliates, parents or subsidiaries within the meaning of Rule 28.1 of the Rules of this Court.

meant that the partnership had withdrawn from the Fund. Hotel Corp. protested the claim, contending that the continuity of Park South Associates as the owner and operator of the hotel and contributor to the Fund meant that no withdrawal had taken place. Nevertheless, the Fund persisted in its view. Required by law to make quarterly installments in excess of $32,000 each in payment of the claimed withdrawal liability totaling $1,000,000 in order to avoid acceleration of the full amount of the claim, Hotel Corp. began making the quarterly payments under protest and commenced this action. *Id.* at 581.

Hotel Corp. sought a declaratory judgment that the August 1981 transfer of partnership interests did not trigger an obligation to pay withdrawal liability under ERISA. While cross-motions for summary judgment were pending, the Fund filed counterclaims against both Hotel Corp. and Park South Associates, as additional counterclaim defendant. The counterclaims sought a declaratory judgment allocating between Hotel Corp. and Park South Associates such withdrawal liability to the Fund as may arise out of a future withdrawal by Park South Associates in the event that the District Court agreed with Hotel Corp. that the 1981 transfer of partnership interests was not a withdrawal. Counterclaims and crossclaims were interposed as a result of this procedural maneuver. The District Court conducted an evidentiary hearing on the cross-motions for summary judgment on March 13 and 14, 1984. Shortly after the hearing, but before the District Court's decision, the Fund and Park South Associates agreed to dismiss the Fund's counterclaim against the partnership concerning the hypothetical future withdrawal. The District Court dismissed the counterclaim without prejudice.

On October 30, 1987, the District Court issued its Opinion and Order, reported at 671 F. Supp. 1000. The District Court held that the partnership had permanently ceased covered operations under the Fund and permanently ceased to have an obligation to the Fund as a result of the transfer of the partnership interests. The District Court relied upon the particulars of the agreements

executed at the 1981 closing allocating among the former partners and the new partners various liabilities arising before, at and after the closing.

The Court of Appeals unanimously reversed. Finding that Park South Associates, the partnership, owned the hotel, contributed to the Fund and continued to do so after the transfer of partnership interests, the Court of Appeals determined that the partnership, and not its general partner, was contributing employer. The Court of Appeals further found that the change in partners did not cause the partnership to terminate. Accordingly, the Court of Appeals found that because the partnership continued its covered operations under the Fund and continued to have an obligation to contribute to the Fund, there was no withdrawal from the Fund as a result of the change in partners. 851 F.2d at 582-3.

The Court of Appeals rejected the Fund's claim that the terms of the sales agreement required a finding that a withdrawal had occurred. The Court found that the agreement between the old partners and the new as to their respective liabilities for obligations to third persons "does not affect the liability of the partnership to the Fund, which federal law created and the determination of which federal law governs. The parties cannot by agreement change or eliminate any liability that federal law imposes upon the partnership." *Id.* at 583.

The Court of Appeals observed that ERISA Section 4218, 29 U.S.C. § 1398 (1982), demonstrates "that Congress did not intend to treat, as an employer withdrawal from a plan, mere changes in the form or structure of an employer that do not alter the employer's basic relation with, participation in, or obligation to, the plan or change the nature of the employer's operations." *Id.* at 583-4. Had the hotel's owner been a corporation and the August 1981 transaction constituted a sale of stock, there would have been no withdrawal by operation of § 1398.

Finally, the Court rejected the Fund's argument that imposing withdrawal liability in this case was necessary to advance the

Congressional purpose underlying the concept of withdrawal liability. The Court again pointed out that the partnership continued to contribute to the Fund and to be liable to the Fund for those contributions and concluded:

> In these circumstances the sale of the partnership interests did not create the problems for the Fund that Congress sought to ameliorate by imposing withdrawal liability.

Id. at 584.

SUMMARY OF ARGUMENT

This case raises no issue of general importance sufficient to merit review by this Court. Determination of the withdrawal liability implications of the change in the identity of the partners in Park South Associates turns upon an analysis of the particular operational arrangements at the hotel before and after the transaction. The Fund does not challenge the analysis by the Court of Appeals of those arrangements or the conclusion that the partnership continued to operate the hotel and to contribute to the Fund without interruption after the substitution of partners. Instead, the Fund argues that the details of the purchase agreement and other documents executed when the partnership interests were sold, and the New York Partnership Law implications of the transaction, have the effect of creating a fictitious interruption in contributions constituting a withdrawal from the Fund.

The argument is not only wrong, but it is so narrow and particularized that its consideration by this Court would provide no guidance to anyone other than the parties herein. Moreover, the record shows that the transaction was negotiated in early 1981, when withdrawal liability was a new concept. Now, more than eight years after withdrawal liability has been a fact of life, it is extremely unlikely that a major transaction such as this would be negotiated without reference to its withdrawal liability implications.

The decision below does not conflict with the decision of any other court. The decision by the United States Court of Appeals

for the Seventh Circuit cited by Petitioner involves an entirely different set of facts. There, it was undisputed that the employer had withdrawn from the multiemployer pension plan; here, withdrawal is the issue in dispute. Notwithstanding this distinction, the decision below in fact adheres to the logic of the Seventh Circuit's opinion. The narrow issue of the withdrawal liability implications of changes in the identity of a partnership's partners has not been addressed by any courts other than in the decision below and a decision in the District of Columbia District, both of which reach the same result.

Finally, the decision below does not threaten to undermine successful accomplishment of the Congressional purpose behind the enactment of ERISA's withdrawal liability provisions. The transaction at issue did not cause the number of contributing employers to diminish and neither caused nor threatened to cause a drop in the number of covered participants or in the amount of incoming contributions. Protecting multiemployer pension plans against the loss of contributing employers does not require imposing withdrawal liability upon a transaction which causes no such loss. The specter of employers scheming to evade withdrawal liability through baroquely devised transactions may be remedied by invocation of ERISA's anti-sham provision. The distortion of the statutory scheme which underlies the Fund's position is no way to accomplish that result.

In short, this case hardly merits discretionary review. *See Rockford Life Insurance Co.* v. *Illinois Department of Revenue*, ___ U.S. ___, ___ n.3, 107 S. Ct. 2312, 2314 n.3 (1987).

ARGUMENT

I

THE PETITION PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW MERITING REVIEW BY THIS COURT

There are no "special and important reasons" within the meaning of Rule 17 of the Rules of this Court for granting review of the decision of the Court of Appeals in this case.

A. The Issues Raised by the Petition Concern Interpretation of Various Agreements and New York Partnership Law.

The Court of Appeals decided that the transfer of partnership interests did not cause the partnership to cease having an obligation to contribute to the Fund or to cease its covered operations under the Fund. The Court found that the partnership's continuing ownership of the hotel, relationship with the union, employment of the hotel's employees and, most importantly, its continuing payment of contributions to the Fund support this conclusion. Of course, cessation of either the contribution obligation or the covered operation is the essential element of a withdrawal. ERISA Section 4203, 29 U.S.C. § 1383 (1982). The Fund does not, and cannot, quarrel with these facts or their inevitable consequences under the relevant statutes.[2]

The Fund focuses upon, and misconstrues, the particulars of the documents which effected the transfer of the partnership interests. Unraveling the Fund's contorted construction of the documents hardly constitutes the kind of compelling federal question which would justify invocation of this Court's power of review on certiorari.

The purchase agreement for the transfer of the partnership interests contained language of indemnity by which the selling general partner, Hotel Corp., relieved the purchasing partners

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[2] The Fund has always based its claim against Hotel Corp. upon the asserted withdrawal of Park South Associates when the partnership interests were transferred and Hotel Corp.'s liability as general partner for the partnership debts. Hotel Corp. had no relation to the Fund other than as a general partner of the limited partnership, Park South Associates. That relationship arose under state partnership law, not a collective bargaining agreement or labor-management relations law, and therefore did not give rise to an "obligation to contribute" within the meaning of ERISA Section 4212 (a), 29 U.S.C. §1392 (a) (1982). Since the partnership owned the hotel, employed the employees and contributed to the Fund, Hotel Corp. itself had no operations under the Fund. Accordingly, Hotel Corp. did not withdraw from the Fund within the meaning of 29 U.S.C. § 1383, since it had no obligation to contribute or covered operations which ceased when it left the partnership.

from liability for obligations "between or among [the former partners] or for any obligation of the [former partners] or any them to a third party." Appendix, *Park South Hotel Corp.* v. *New York Hotel Trades Council, supra,* Docket No. 87-9025 at 366-67 (hereinafter "2d Cir. App."). Indemnification agreements are simply a means of completely shifting a liability from one party to another. They do not themselves create a liability to be shifted. In context of the transaction at issue, the indemnification agreements protect the new partners from lurking preexisting debts or obligations of the old partners and were incorporated into the purchase documents with the purpose, as stated therein, of inducing the purchasing partners to purchase the partnership interests. Withdrawal liability is not a debt that arises before withdrawal merely because it is calculated upon the basis of pre-withdrawal contributions and unfunded vested liabilities. *Teamsters Pension Trust Fund of Philadelphia* v. *Central Michigan Trucking, Inc.*, No. 87-2023 (6th Cir. Sept. 28, 1988), 1988 U.S. App. Lexis 13013. To argue that the indemnification agreements in fact created a withdrawal liability is circular and wholly unpersuasive.

Even if this Court were inclined to delve into the details of this transaction as the Fund requests, the fact remains that withdrawal liability arises out of the objective facts of relations between an employer and a pension fund. Congress has decreed that only a sale of assets transaction may be deliberately structured on paper by the parties to affect the question of whether withdrawal liability accrues as result of the transaction. *See,* ERISA Section 4204, 29 U.S.C. § 1384. The instant transaction, however, was not a sale of assets but, rather, a transfer of interests in a limited partnership. Hotel Corp. has never contended that § 1384 has any relevance to this case.

In asking the Court to hold that the provisions of the purchase agreement are dispositive of the question of withdrawal liability, the Fund proposes that purchasers and sellers of partnership interests be given a totally free hand to make any kind of deal they want in order to manipulate withdrawal liability. The

suggestion invites determination of withdrawal liability issues without regard to whether there has been a withdrawal in the statutory sense enacted by Congress—actual cessation of either the contribution obligation or plan-covered operations. Such a result would be inconsistent with the law and detrimental to the policy it embodies since it would leave multiemployer plans at the mercy of creative fashioners of business transactions.

The Fund also argues that the the transfer of partnership interests constituted a withdrawal from the Fund by referring to New York Partnership Law, claiming that the decision of the Court of Appeals construing the New York Partnership Law implications of the change in partners was "clearly erroneous." (Cert. Petition at 14.) Again, the Fund fails to present an issue worthy of review by this Court.

In the first place, this Court does not usually sit to correct erroneous interpretations of state law.[3] Second, the Court of Appeals reached a correct result under state law. The original partnership agreement creating Park South Associates permitted the general partner and the limited partners to transfer their interests. 2d Cir. App. at 875. New York Partnership Law permits a limited partnership to continue nonwithstanding a change in the identity of its partners. *Kanarek* v. *Gadflex Assoc.*, 115 A.D. 2d 592, 496 N.Y.S.2d 253 (2d Dept. 1985), *app. denied*, 67 N.Y.2d 602 (1986). *See* N.Y. Partnership Law §§ 53(1), 98 and 108 (McKinney 1988). Dissolution of a partnership does not cause its termination. N.Y. Partnership Law § 61 (McKinney 1988). *See also Neuberger, Loeb & Co.* v. *Gross*, 611 F.2d 423, 427 (2d Cir. 1979).

B. Consideration of the Issues Decided by the Court of Appeals Will Not Contribute to Settling an Important Legal Issue of General Concern.

First, as stated above, resolution of this action depends upon the specifics of the 1981 transaction and its aftermath at the hotel.

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[3] Conflict between a decision of a Court of Appeals and state law was eliminated in 1980 from the enumeration of grounds for granting a writ of certiorari appearing in Former Rule 19.

The withdrawal liability implications of those particulars will give little guidance to participants in other business transactions.

Second, the circumstances giving rise to this action are unlikely to recur. The negotiations leading up to the transfer of partnership interests began early in 1981, only four months after Congress enacted ERISA's withdrawal liability provisions. In fact, the law was so new that the question of withdrawal liability never came up during any of the negotiations leading to the transfer. Now withdrawal liability has been a fact of commercial life for more than eight years, and business transactions routinely comprehend the withdrawal liability implications. The paucity of reported cases on the subject of partnerships and withdrawal liability demonstrates the absence of a need for this Court's intervention on the subject.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH EITHER THE HOLDING OR THE LOGIC OF ANY OTHER DECISION

A. The Seventh Circuit Has Not Issued A Conflicting Ruling.

The Fund's selection of *Central States, Southeast and Southwest Areas Pension Fund* v. *Belmont Trucking Co., Inc.*, 788 F.2d 428 (7th Cir. 1986), as the decision conflicting with the decision below in this action demonstrates a thorough misunderstanding of the issue before the Seventh Circuit in that case. In *Central States* the employer acknowledged that it stopped paying contributions to the multiemployer plan and argued only that withdrawal liability should not be assessed because its employees had been hired by other contributing employers. The employer relied upon the continuing relationship between its *employees* and the Fund to argue that it did not owe any withdrawal liability. The Seventh Circuit's rejection of this argument has no bearing on

this case,[4] which turns upon the continuing relationship between the Fund and the *employer*, Park South Associates. In *Central States*, the fact of withdrawal was undisputed and the Seventh Circuit never discussed it; in the present case, the threshold question of whether a withdrawal occurred in the *only* issue.

The rationale of the Seventh Circuit Court of Appeals in *Central States* actually supports Hotel Corp.'s position in this case.[5] The court in *Central States* observed that the policy underlying withdrawal liability includes the need to compensate a muliemployer pension plan for the shrinkage of the plan which results when the number of employers decreases. There is a presumptive loss of jobs when an employer goes out of business as did the employer in *Central States*. The court went on to say:

> But this presumption should not attach merely because a covered enterprise changes its name, its *ownership* or its structure while its operations are carried on generally intact . . . .

788 F.2d at 433 (emphasis added). Of course, that is precisely what happened in the present case. The change in the partnership's owners did not cause any diminution in the number of employers contributing to the Fund and posed no threat of any loss of jobs. Thus, the decision of the Court of Appeals herein simply cannot be said to create a conflict within the federal judiciary requiring resolution by this Court.

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[4] The Fund cited the *Central States* decision only in passing in its brief to the Court of Appeals and did not argue that a decision in favor of Hotel Corp. would conflict with the decision in *Central States*. *See* Brief for Appellee at 49, *Park South Hotel Corp.* v. *New York Hotel Trades Council, supra*, Docket No. 87-9025.

[5] The same may be said of the recent decision by the Sixth Circuit in *Teamster Pension Trust Fund of Philadelphia, supra*, 1988 U.S. App. LEXIS 13013, holding that a parent company which spins off a subsidiary has no contingent withdrawal liability which becomes due should the spun-off company subsequently withdraw.

B. The Decision Below is Consistent with the Only Other Relevant Precedent.

The only other reported decision concerning partnerships and withdrawal liability reached the same conclusion as did the Court of Appeals herein. In *Connors* v. *B&W Coal Co., Inc.*, 646 F. Supp. 164 (D.D.C. 1986), the employer, a partnership, argued that withdrawal from a multiemployer plan took place before MPPAA's effective date. The claimed withdrawal was said to have occurred when one of the two partners sold his interest in the partnership. The Court rejected the argument, relying upon ERISA Section 4218, 29 U.S.C. § 1398, which provides in relevant part:

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because —
>
> (1) an employer ceases to exist by reason of —
>
> (A) a change in corporate structure described in section 1362 (d) of this title, or
>
> (B) a change to an unincorporated form of business enterprise,
>
> if the change causes no interruption in employer contributions or obligations to contribute under plan . . . .

The Court rejected the notion that Section 1398 exempted from withdrawal liability only those changes in business form which corporations, as opposed to partnerships or sole proprietorships, undergo:

> [S]ection 4218(1) (b) [29 U.S.C., Section 1398 (1) (B)] explicitly applies whenever an "employer" ceases to exist because of a "change to an unincorporated form of business enterprise." It does not state, as defendant would have it, that the section applies only when there is a change from a corporate to an unincorporated enterprise. Indeed, an "employer" is defined by ERISA to include not only

> corporations, but also individuals, partnerships, and unincorporated associations. 29 U.S.C. § 1002(5), (9). Second, by substituting the word "corporation" for "employer," defendants would exempt reorganizations of partnerships from section 4218, a result totally inconsistent with its purposes.

Connors at 168. Thus, the Court in *Connors* held that Section 1398 carves out from the ambit of the Act's definition of "permanent cessation" the situation in which an "employer," be it a corporation, individual, partnership or unincorporated association, undergoes a "change to an unincorporated form of business." As a result, the transfer of the partnership interest did not constitute a withdrawal from the plan.

The Court of Appeals herein reached the identical conclusion with respect to the transfer of the interests in Park South Associates. While the Court of Appeals used slightly different reasoning with respect to Section 1398, the most that can be said is that the difference may "present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice* v. *Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 74 (1955). *Connors* and the decision below herein both hold that a change in a partnership's partners does not trigger withdrawal liability if the partnership's operations and contributions to the plan survive the change. [6] There is no decision to the contrary.

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[6] The Court of Appeals correctly concluded that Section 1398 does not bear directly on this case. Like any exemption, Section 1398 presumes that a withdrawal has occurred; otherwise no exemption would be necessary. Section 1398 applies when a withdrawal occurs because an employer "ceases to exist." Park South Associates never ceased to exist and did not otherwise withdraw from the Fund. The significance of Section 1398 lies in its articulation of the principle that mere changes in business form that do not disrupt contribution obligations should not trigger withdrawal liability. The decision of the Court of Appeals is consistent with that principle.

III.

THE DECISION OF THE COURT OF APPEALS DOES NOT JEOPARDIZE ANY POLICY INTEREST EMBODIED IN ERISA'S WITHDRAWAL LIABILITY PROVISIONS

The Fund argues that review and reversal of the decision by the Court of Appeals is necessary to alleviate a supposed threat to the contribution bases of multiemployer pension plans. The suggested threat is entirely illusory.

An inability to impose withdrawal liability upon a transaction when the employer continues to contribute to the plan after the transaction at issue does not deprive the Fund of any protection Congress intended to provide. By definition, there is no downward spiral in the number of contributing employers or participating employees in such a circumstance, and there is no loss in future contributions for which the Fund and its contributing employers require compensation in the form of withdrawal liability.

The decision below certainly does not imperil the Fund with respect to this particular set of facts. The change in partners cannot be said to have jeopardized the Fund's ability to collect future contributions or future withdrawal liability since the new general partner is Donald Trump. The risk that a court adjudicating a claim for withdrawal liability arising out of a real future withdrawal might disagree with the Court of Appeals, leaving the Fund with nothing, is extremely remote. It could have been avoided entirely had the Fund not agreed to discontinue the counterclaims, which were interposed to eliminate that very possibility.

The decision below likewise does not create extrastatutory opportunities to evade the obligation to pay withdrawal liability. The Fund's argument in this regard assumes that Section 1384, the sale of asset provision, prescribes the *only* manner in which a business may be sold without incurring withdrawal liability. The

assumption lacks validity because it ignores the plain fact that certain transactions, like the change in partners involved in the present case, do not create a withdrawal at all. When a contributing employer sells its assets and thereby ceases to have an obligation to contribute to the plan, it has withdrawn and withdrawal liability will be attached absent the statutory exemption embodied in Section 1384. When there is no withdrawal to begin with, there is no need to invoke any statutory exemption since withdrawal liability may not be imposed absent a withdrawal.

The Fund's observation that no statutory exemption expressly bars imposition of withdrawal liability when partnership interests are sold is beside the point. When, as in the present case, there is no withdrawal an exemption is not needed to defeat the Fund's claim. The Fund is asking this Court to amend ERISA by adding a provision commencing, "Notwithstanding the absence of a withdrawal, a plan may collect withdrawal liability when the following occurs...." The provision would then presumably catalog the various kinds of deals from which the Fund would collect a windfall of the type it attempted to claim from Hotel Corp. Congress, rather than this Court, is the proper venue for such a plea, where it would undoubtedly be rejected as well since Congress did not intend to provide a windfall to multiemployer plans when it created withdrawal liability.

The Fund raises the specter of employers rushing to structure transactions as partnership transfers in order to evade the duty to pay withdrawal liability without complying with the bonding and other requirements in Section 1384. First, the Fund makes no such allegation against Hotel Corp., and it has never relied upon ERISA's anti-sham provision discussed immediately *infra*. Second, the decision below offers no "escape hatch" except in situations like the one in this case in which withdrawal liability should not be imposed to begin with. Moreover, Congress foresaw the evasion problem and provided a remedy by enacting an anti-sham provision as part of MPPAA, ERISA Section 4212(c), 29 U.S.C.§ 1392(c) (1982), which provides:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Congress having adequately protected multiemployer plans from evasion, judicial revision of the concept of "withdrawal" to accomplish that purpose is unnecessary, as well as jurisprudentially unwarranted. "There is no congressional mandate to engage in legal gymnastics in order to guarantee pension plans at all costs . . . or to apply the statute in a nonsensical fashion in order to assure full payment of withdrawal liability." *Teamsters Pension Trust Fund of Philadelphia, supra,* 1988 U.S. App. Lexis 13013 at 5.

Finally, the Fund complains that the Court of Appeals has contravened an alleged policy which is said to encourage changes in business form which cause the number of "responsible parties" to increase while discouraging those changes which cause a decrease in their number. The Fund cites no legislative history announcing this so-called policy and there is no reason to believe that Congress enacted MPPAA with that idea in mind. More significantly, there is nothing inherent in either incorporating or unincorporating, selling stock or selling partnership interests, to justify a presumption that any one necessarily increases or decreases the number of "responsible parties" more than any other. Either a transfer of partnership interests or incorporation of a partnership can cause an enterprise to become part of a group of trades or business under "common control", 29 U.S.C. § 1301 (b)(1), or to leave such a group. It all depends on the particulars of the individual transaction. The "policy" which the Fund professes to have found either does not exist, or has nothing to do with whether businesses function as partnerships or corporations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, New York
October 26, 1988

APPENDIX

29 U.S.C. § 1301. Definitions

* * *

(b) (1) . . . . For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or business (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

29 U.S.C. § 1383. Complete withdrawal

(a) *Determinative factors*

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer-

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1392. Obligation to contribute

(a) *Definition*

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty arising under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

* * *

(c) *Transactions to evade or avoid liability*

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

29 U.S.C. § 1398. Withdrawal not occur because of change in business form or suspension of contributions during labor dispute

Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because -

(1) an employer ceases to exist by reason of -

(A) a change in corporate structure described in section 1362 (d) of this title, or

(B) a change to an unincorporated form of business enterprise,

if the change causes no interruption in employer contributions or obligations to contribute under the plan. . . .

N. Y. Partnership law § 53. Assignment of partner's interest

1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management of administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

N.Y. Partnership Law § 61. Partnership not terminated by dissolution

On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

N. Y. Partnership Law § 98. Rights, powers and liabilities of a general partner

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate.

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership.

(c) Confess a judgment against the partnership.

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose.

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

N. Y. Partnership Law § 108. Assignment of interest

(1) A limited partner's interest is assignable.

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(4) An assignee shall have the right to become a substituted limited partner if all the members, except the assignor, consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.